

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY M. SOUTHERN
Claimant

VS.

UNIFIED SCHOOL DISTRICT 259
Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. 1,001,567

ORDER

Respondent appealed Administrative Law Judge John D. Clark's Award dated December 6, 2002. The Board heard oral argument on May 16, 2003. Stacy Parkinson was appointed as Board Member Pro Tem for the purpose of determining this matter.

APPEARANCES

Chris Clements of Wichita, Kansas, appeared for the claimant. Gary K. Albin of Wichita, Kansas appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties agreed that the correct payment rate for temporary total disability compensation was \$263.73. In addition, the parties agreed that if the Administrative Law Judge's pre-injury and post-injury average weekly wage findings are adopted the wage loss would correctly calculate to 48 percent.

ISSUES

The Administrative Law Judge (ALJ) found claimant suffered a 44.5 percent work disability based upon a task loss of 36.5 percent and a wage loss of 52.5 percent.¹

¹ The work disability correctly calculates to 42 percent using the wage loss of 48 percent.

Respondent requested review of the nature and extent of claimant's disability. Respondent argues claimant refused accommodated employment and should be denied a work disability. In the alternative, respondent argues claimant did not make a good faith effort to find appropriate employment and a wage should be imputed. Lastly, respondent argues the task loss opinion provided by Dr. John P. Estivo is more persuasive than that provided by Dr. Pedro A. Murati.

Claimant requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board affirms the ALJ's findings but modifies the Award to reflect the parties agreed temporary total disability compensation rate and to correct the calculation of the work disability based upon a 48 percent wage loss and a 36.5 percent task loss.

The Board finds the ALJ's findings and conclusions are otherwise accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Because claimant's injuries comprise an unscheduled injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*² and *Copeland*.³ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above-quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon his or her ability to earn wages rather than the actual wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,⁵ where the accommodated job violates the worker's medical restrictions,⁶ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.⁷

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. Respondent argues claimant refused accommodated work. But the offered accommodated work as a para professional was part time for fewer than 40 hours a week and would have lasted just 9 months. Although such employment would not have returned claimant to a comparable wage, nonetheless, it would have provided income while claimant continued her job search for full time

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Id.* at 320.

⁵ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁶ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁷ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

employment. Consequently, the Board adopts the ALJ's finding claimant did not demonstrate a good faith effort to return to employment and further adopts the ALJ's finding claimant had the ability to earn \$287.23 per week which results in a wage loss of 48 percent.

When considering the entire record, the Board concludes that due to her back injury claimant has lost the ability to perform some of the work tasks that she performed during the fifteen-year period preceding the accident. The Board finds that claimant's task loss falls somewhere between the 23 percent task loss determined by Dr. Estivo and the 50 percent task loss determined by Dr. Murati. Consequently, the Board adopts the ALJ's determination to give equal weight to those opinions which results in a task loss of 36.5 percent.

Combining a 36.5 percent task loss with a 48 percent wage loss results in a work disability of 42 percent. The Board modifies the ALJ's award to reflect claimant suffered a 42 percent work disability.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge John D. Clark dated December 6, 2002, is corrected to reflect claimant suffered a 42 percent work disability.

The claimant is entitled to 8.29 weeks of temporary total disability compensation at the rate of \$263.73 per week or \$2,186.32 followed by 174.3 weeks of permanent partial disability compensation at \$370.48 per week or \$64,574.66 for a 42 percent permanent partial general body disability making a total award of \$66,760.98.

As of June 30, 2003, there would be due and owing to claimant 8.29 weeks temporary total disability compensation at the rate of \$263.73 per week in the sum of \$2,186.32 plus 76.28 weeks of permanent partial disability compensation at \$370.48 per week in the sum of \$28,260.21 for a total due and owing of \$30,446.53 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance shall be paid at the rate of \$370.48 per week for 98.02 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Clements, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director